IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 658

PACKARD MOTOR CAR COMPANY,
a Michigan corporation,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER, PACKARD MOTOR CAR COMPANY

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AUTHORITIES CITED

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PRELIMINARY STATEMENT

This typewritten reply brief is filed pursuant to permission granted by the Court at the conclusion of the hearing before the Court on January 9, 1947.

ARGUMENT

POINT I

REPLY TO RESPONDENT'S CONTENTION THAT SUPERVISORY EMPLOYEES CAN BE BOTH EMPLOYERS AND EMPLOYEES UNDER THE ACT

The respondent plainly disregards the language of the National Labor Relations Act and the intent of Congress in maintaining that the supervisors of the petitioner are both employers and employees under the Act.

The Act (Section 2) *does not* define an *employee* as including persons who act directly or indirectly in the interest of the employer. It defines an *employer* in that manner and after thus defining an employer and carving out of the employee class those employees who thus act directly or indirectly for an employer, proceeds to the definition of an employee.

The respondent completely disregards the provisions of Section 7 of the Act.

The fundamental purpose of the Act as stated by Congress in Section 7 is to eliminate interference with interstate commerce by providing for collective bargaining between *employer* and the *employees*. In Section 7, Congress sets forth the rights which "employees" under the Act must have in order to effectuate such purpose. Section 7 reads as follows:

> "*Employees* shall have the right to *self-organization*, to *form*, *join*, or *assist labor organizations*, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining, or other mutual aid or protection."

This Court and other courts have held that this right given by Congress to those who are *employees* under the Act "to form, join, or assist labor organizations" is a "complete and unfettered freedom of choice." *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 588.

The provisions of Section 7 relate to and are granted to all persons who are "employees" under the Act. Counsel for the respondent at the hearing before the Court admitted that under the respondent's interpretation of the Act every member of the managerial hierarchy of the petitioner is an "employee." This would include the president and the vice-presidents, as well as the foreman level of management. If the respondent is right, then the president, the vice-presidents, as well as the supervisors of the petitioner, must have the same "complete and unfettered freedom of choice" as the rank and file or non-supervisory employees, "to form, join, or assist labor organizations," for this is the right given by Congress to all "persons" who are "employees" under the Act.

This right would include, of course, the right to foster their own union and oppose activities of rival organizations. The respondent Board has never denied that the rank and file worker has this right.

This Court, other courts, and the respondent, however, have held without exception that supervisory employees do not have such freedom; that they do not have "complete and unfettered choice" to join and assist labor organizations.

The lower court in this case said (R. III, 2103):

> "Moreover, the Board and the courts have repeatedly held that the foreman acts for his employer to such an extent that his statements and conduct, if hostile to the union, make the employer liable under

an unfair labor charge. *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72; *National Labor Relations Board v. Marquette Metal Products Co.*, 152 F. (2d) 964 (C. C. A. 6); *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 598. This is true even though the employer has not authorized such statements or conduct. *Matter of Tenn-Copper Co.*, 9 N. L. R. B. 117, 118; *Matter of Inland Steel Co.*, 9 N. L. R. B. 783, 808; *Matter of American Steel Scraper Co.*, 29 N. L. R. B. 939, 943; *Matter of Schult Trailer, Inc.*, 28 N. L. R. B. 975, 993. In *Matter of Emsco Derrick & Equipment Co.*, 11 N. L. R. B. 79, 87, the Board significantly declared: '* * * the supervisor acts as an agent for the employer, and his acts are necessarily those of the employer unless effectively disavowed.' The same doctrine was emphatically declared in *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, in which the employer was held responsible although it had not proposed or stimulated the formation of a plant union. The court held the employer responsible for unauthorized activities of supervisory employees, not upon the principle of agency or *respondeat superior*, but under the broad provisions of the Act condemning such activities as constituting an unfair labor practice.

"Likewise the membership of foremen and supervisory employees in an independent or plant union has repeatedly been held by the Board to constitute evidence of employer domination calling for the disestablishment of the independent or plant union. * * *"

There can be no quarrel with the position taken by the courts because when supervisory employees attempt to exercise the rights given "employees" who are under the Act—the rank and file workers—they would, as the courts have held, coerce and restrain the freedom of the workers guaranteed by Section 7 of the Act.

It must follow that if the actions of supervisors in engaging in activities on behalf of or against labor organizations are imputable to the petitioner, then the petitioner must have the right to discipline or discharge such supervisory employees to protect itself, and the respondent has so held in *Matter of E. Anthony & Sons, Inc.*, 70 N. L. R. B. No. 57 (Aug. 29, 1946) and *Matter of Wells, Inc.*, 68 N. L. R. B. No. 78 (June 12, 1946).

If, however, the supervisors are "employees" under the Act, the action of the petitioner in disciplining or discharging them as aforesaid would be a direct violation of their rights as such "employees" to "form, join and assist labor organizations" given them by the express language of Congress in Section 7 of the Act.

Manifestly, neither the respondent Board nor the courts have the power to take from any employee who is an "employee" within the meaning of the Act, the rights, powers and privileges given by Congress to such "employees."

It must follow that the supervisors of the petitioner are not "employees" within the meaning of the Act.

POINT II

REPLY TO RESPONDENT'S POSITION THAT ALL THE COURT NEED CONSIDER IS WHETHER BOARD'S DETERMINATION THAT FOREMEN ARE "EMPLOYEES" WITHIN THE MEANING OF THE ACT HAS "WARRANT IN THE RECORD" AND HAS "A REASONABLE BASIS IN LAW"

The Board cites *N. L. R. B. v. Hearst Publications*, 322 U. S. 111, in support of its position. As demonstrated in the original brief (pp. 48-49) and the brief of Carnegie-Illinois Steel Corporation, as *amicus curiae*, this decision when read in connection with the facts, does not support the Board.

It is a fundamental rule of law that questions of statutory construction are for the courts to resolve. No administrative agency has the unlimited authority to determine its own jurisdiction.

The Board treats the Act as remedial legislation that must be liberally construed to accomplish its purpose and freely indulges in inferences and presumptions. Every act of the legislature in a certain sense is of course remedial legislation. But any legislation which changes the common law must clearly indicate that it was the intention of Congress to make such a change.

The National Labor Relations Act is in derogation of the common law and therefore should be strictly construed and not held to cover situations and persons not clearly within its language.

As was stated by the Court in *Texas and Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 437:

> "* * * a statute will not be construed as taking away a common law right existing at the time of its

> enactment unless the result is imperatively required."

This case involved the construction of the Interstate Commerce Act, which was just as much remedial legislation as the National Labor Relations Act.

In *Thompson v. Thompson*, 218 U. S. 611, the court said (p. 618):

> "It must be presumed that the legislators who enacted this statute were familiar with the long-established policy of the common law, and were not unmindful of the radical changes in the policy of centuries which such legislation as is here suggested would bring about. Conceding it to be within the power of the legislature to make this alteration in the law, if it saw fit to do so, nevertheless such radical and far-reaching changes should only be wrought *by language so clear and plain as to be unmistakable evidence of the legislative intention.* * * * *it would have been easy to have expressed that intent in terms of irresistible clearness.*"

In *United States v. Masonite Corp.*, 316 U. S. 265, the Court said (p. 280):

> "Congress has provided that a patentee shall have the 'exclusive right to make, use and vend the invention or discovery' for a limited period. 46 Stat. 376, 35 U. S. C. §40, 35 U. S. C. A. §40. But the *scope of the right* to 'vend' *cannot be determined by reference to the private law of sales alone.* Since patents are *privileges restrictive of a free economy*, the rights which Congress has attached to them must be strictly construed *so as not to derogate from the general law beyond the necessary requirements of the patent statute.*"

In *Scharfeld v. Richardson*, 133 F. (2d) 340 (U. S. Ct. of App., D. C., 1942), the Court said (p. 341):

> "The suggested construction would change the common law rule. No explicit provision for such a change is contained in the Act. *The courts have consistently held legislation derogative of the common law accountable to an exactness of expression, and have not allowed the effects of such legislation to be extended beyond the necessary and unavoidable meaning of its terms.* The presumption runs against such innovation. This is merely a familiar principle of statutory construction."

Numerous other cases might be cited, but the rule is so universal that further citation of authority is not considered necessary.

It cannot be questioned that the Act is in derogation of the common law rights of not only the employer, but also of the employee. Under the common law the employer had a right to contract with his individual employees and the individual employees had a right to contract for their services with the employer. The Act does away with these contract rights and brings about an arrangement for collective bargaining in which employees, even though they may not wish to be, are represented and their rights fixed in a contract entered into by representatives selected by a majority of a unit which is fixed by a third party, to-wit: the Board. Many of the employees so represented may not desire either to be represented or to be represented by the representatives certified by the Board. Thus in this case 435 foremen out of approximately 1100 voted against representation by the union. Unfortunately, the foremen in this case who wish to remain independent must be inarticulate, for there is no provision in the Act which gives them an opportunity to be heard in the protection of their legal rights as individuals.

The act, therefore, not only restrains and prohibits both the employer and the employee from exercising their com-

mon law rights, but forces the employee to cast his lot with the unit and an unwanted representative.

If the foregoing rule of statutory construction is applied in this case, supervisory employees cannot be held to be employees within the meaning of the Act. Such construction certainly is not required by clear and unambiguous language of the Act. On the contrary, as set forth in petitioner's original brief, the language of the Act clearly demonstrates that it was not the intention of Congress to include such supervisory employees within the coverage of the Act.

CONCLUSION

It is respectfully submitted that the enforcement of the Board's order should be denied by this Court.

Respectfully submitted,

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ERRATA:

In the petitioner's original brief on pages 61 and 65, it is stated that *Matter of Maryland Drydock Co.*, 49 N. L. R. B. 733, was decided by the Board on May 11, 1934. This case was actually decided by the Board of May 11, 1943.